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UNITED STATES V. INADI: CO-CONSPIRATORS LOSE THE BATTLE BETWEEN THE CONFRONTATION CLAUSE AND HEARSAY

I. INTRODUCTION

For nearly a century, the United States Supreme Court has struggled to reconcile the competing interests of a criminal defendant's right to confrontation as mandated in the sixth amendment with the prosecutorial need for admitting relevant information through the use of hearsay exceptions.¹ The sixth amendment's confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."² However, some hearsay exceptions³ allow out-of-court statements to be admitted at trial for their truth even when the maker of the statement is absent from the courtroom.⁴ These hearsay exceptions appear to conflict with a criminal defendant's confrontation right. The Supreme Court has held that the right of confrontation and the law of hearsay are not coextensive.⁵ Thus, admitting a hearsay statement into evidence may violate the confrontation clause although the evidence falls within a recognized hearsay exception.⁶ Conversely, evidence admitted in violation of the

1. Thirty-one states, the military and Puerto Rico have adopted evidence codes which are identical or substantially similar to the Federal Rules of Evidence. See J. WEINSTEIN & M. BERGER, *Note on State Adaptations of Federal Rules of Evidence; Military Rules of Evidence* in 1 WEINSTEIN'S EVIDENCE T-1 (1986).

2. U.S. CONST. amend. VI, cl. 2.

3. FED. R. EVID. 801(d), 803. Rule 803 enumerates hearsay *exceptions* whereas Rule 801(d) enumerates hearsay *exemptions*. The Supreme Court makes no distinction between hearsay exceptions and exemptions in its analysis of the confrontation clause. *United States v. Inadi*, 106 S. Ct. 1121, 1128 n.12 (1986). In this Note, they will both be referred to as exceptions.

4. See *infra* note 295 for a discussion of hearsay exceptions which require a showing of unavailability and those in which availability is immaterial.

5. *Dutton v. Evans*, 400 U.S. 74, 86 (1970). The Court stated that "[i]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two" *Id.* at 86. In a footnote, the Court noted that the constitutional provision may be based on a common-law principle having its origin in a reaction to the abuses at the trial of Sir Walter Raleigh. *Id.* at 86 n.16. See *infra* note 53.

6. See *Barber v. Page*, 390 U.S. 719 (1968) (preliminary hearing testimony used against defendant); *Pointer v. Texas*, 380 U.S. 400 (1965) (preliminary hearing testimony used against defendant). See *infra* notes 92-109 and 64-77 and accompanying text for a discussion of these respective cases.

hearsay rules does not necessarily mean that the accused's confrontation right has been violated.⁷ The Supreme Court has stated:

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.⁸

The difficulty in balancing the competing interests of this constitutional protection with the necessity of admitting relevant information can be evidenced in trying to reconcile the Court's interpretations.⁹ Justice Harlan once wrote that "the Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause."¹⁰ In 1980, however, the Court in *Ohio v. Roberts*¹¹ appeared to put to rest the uncertainty about the relationship between the confrontation clause and the law of hearsay when it announced that "a general approach to the problem is discernible."¹² The Court established a two-prong test for determining when an out-of-court statement falling within a hearsay exception may be admitted without violating the accused's confrontation right. The Court stated that "the Sixth Amendment establishes a rule of necessity. . . . [T]he prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the

7. See Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 236-37 (1968); Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1436 (1966).

8. *Dutton*, 400 U.S. at 81-82 (citations and footnotes omitted) (citing *California v. Green*, 399 U.S. 149, 155-56 (1970)).

9. See *infra* notes 53-187 and accompanying text for a discussion of the conflict between the confrontation clause and the hearsay exceptions. See also Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 217-21 (1984); Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 670-77 (1986).

10. *California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring).

11. 448 U.S. 56 (1980). See *infra* text accompanying notes 162-87 for a discussion of the case.

12. 448 U.S. at 65.

defendant. . . . Even then, [the] statement is admissible only if it bears adequate 'indicia of reliability.'"¹³ Thus, the Court established the clear constitutional requirement of unavailability¹⁴ and reliability for the lower courts to follow.¹⁵

The Court's recent decision, *United States v. Inadi*,¹⁶ retreats from the two-prong test announced in *Roberts*¹⁷ by limiting the unavailability requirement to only prior testimony. This Note examines the potential effect of the *Inadi*¹⁸ decision and finds that the Court failed to answer the question of when unavailability must be shown. Therefore, after the *Inadi* decision the courts are thrown back into a state of confusion over the relationship between the confrontation clause and the law of hearsay.

II. STATEMENT OF THE CASE

In the United States District Court for the Eastern District of Pennsylvania, a jury convicted the defendant, Joseph Inadi, of conspiring to manufacture and distribute methamphetamine and four related narcotics

13. *Id.* at 65-66.

14. Federal Rule of Evidence 804(a) defines unavailability of a witness as follows:

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means.

FED. R. EVID. 804(a).

15. See, e.g., *United States v. Caputo*, 758 F.2d 944, 950 n.2 (3d Cir. 1985) (unavailability of co-conspirator declarant must be shown to admit declarant's out-of-court statements against defendant); *United States v. Massa*, 740 F.2d 629, 639 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) (unavailability of co-conspirator declarant must be shown to admit declarant's out-of-court statements against defendant); *United States v. Ordonez*, 737 F.2d 793, 802 (9th Cir. 1984) (unavailability of out-of-court declarant must be shown to admit declarant's ledger entries against defendant); *Haggins v. Warden*, 715 F.2d 1050, 1055 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984) (incompetence of minor satisfied unavailability requirement to admit extrajudicial statements against defendant); *United States v. Lisotto*, 722 F.2d 85, 88 (4th Cir. 1983), *cert. denied*, 466 U.S. 905 (1984) (fugitive co-conspirators satisfied unavailability requirement to admit extrajudicial statements against defendant). Cf. *United States v. Panas*, 738 F.2d 278, 283-84 (8th Cir. 1984) (unavailability need not be shown to admit evidence under co-conspirator exemption); *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), *cert. denied*, 459 U.S. 843 (1982) (admission of statements by alleged co-conspirator does not violate confrontation clause).

16. 106 S. Ct. 1121, 1125-26 (1986).

17. 448 U.S. at 65-66.

18. 106 S. Ct. 1121, 1123 (1986).

charges.¹⁹ He was sentenced to three years imprisonment followed by seven years parole.²⁰

Michael McKeon (McKeon), an unindicted co-conspirator, testified at trial under a grant of use immunity²¹ that he approached Inadi in September of 1979 seeking a distribution outlet for methamphetamine.²² They reached an agreement whereby Inadi was to supply cash and chemicals for the manufacture of the drug and was to be responsible for its distribution.²³ McKeon and William Levan (Levan), another unindicted co-conspirator, were responsible for manufacturing the substance.²⁴

During the conspiracy, Inadi, McKeon and Levan met with John Lazaro (Lazaro), the third unindicted co-conspirator, at a house to extract additional methamphetamine from the liquid residue of previous batches of the substance.²⁵ On May 23, 1980, two police officers surreptitiously entered the house with a warrant and confiscated a tray of drying methamphetamine.²⁶ The police delayed returning the tray, leaving the conspirators speculating over what happened to it.²⁷

On May 25, 1980, two Drug Enforcement Agency (DEA) agents observed a meeting between Inadi and Lazaro in the parking lot of a restaurant.²⁸ During the course of the meeting, the agents saw Inadi lean on Lazaro's car.²⁹ After Lazaro drove away, the agents stopped his car.³⁰ They searched Lazaro, his wife, Marianne, who was a passenger, and the vehicle, but found nothing.³¹ Eight hours later, another DEA agent returned to the scene of the stop and found a clear plastic bag containing a white powder which was later identified as methamphetamine.³² Marianne Lazaro testified at trial—under a grant of use immunity—that after the meeting in the parking lot, her husband handed her a clear plastic bag containing white powder.³³ During the

19. *United States v. Inadi*, 106 S. Ct. 1121, 1123 (1986).

20. *Id.*

21. "Use immunity" protects a witness from subsequent use of the immunized testimony against the witness in a criminal prosecution. MCCORMICK, EVIDENCE 355 (E. Cleary, 3d ed. 1984).

22. *Inadi*, 106 S. Ct. at 1123.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *United States v. Inadi*, 748 F.2d 812, 815 (3d Cir. 1984).

29. *Inadi*, 106 S. Ct. at 1123.

30. *Id.*

31. *Id.*

32. *Id.* at 1123-24.

33. *Inadi*, 748 F.2d at 815, *rev'd*, 106 S. Ct. 1121 (1986).

search of the car, she threw the bag away.³⁴ At trial, she denied that the bag and powder found by the agent were the items that her husband had given her.³⁵

From May 23 to May 27, 1980, the police recorded five telephone conversations between the participants in the conspiracy.³⁶ The conversations, played for the jury at trial, consisted of three discussions between Inadi and Lazaro in which: (1) Lazaro appeared to ask in code for some methamphetamine; (2) they speculated about the missing tray taken from the house; (3) they set up a meeting at the restaurant parking lot; and (4) they discussed the DEA car stop.³⁷

Inadi sought to exclude the recorded statements of Lazaro and the others on the basis that the statements did not satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E),³⁸ which governs the out-of-court statements of co-conspirators.³⁹ The trial court ruled that the conversations were admissible, finding that they were made in the course of, and in furtherance of, the conspiracy.⁴⁰ Inadi also objected to admission of the statements on the ground that his confrontation rights had been violated since the prosecution did not show Lazaro to be unavailable.⁴¹ The trial judge suggested that the prosecution bring Lazaro to court in order to demonstrate his unavailability.⁴² The co-conspirator statements were admitted on the condition that the prosecution produce Lazaro.⁴³ Lazaro was subpoenaed by the government but failed to appear, claiming car trouble.⁴⁴ When Inadi renewed his confrontation right objection by arguing that the prosecution had not demonstrated Lazaro's unavailability, the court overruled the objection.⁴⁵ The court ruled that Lazaro's statements were admissible because they satisfied the explicit require-

34. *Id.*

35. *Id.*

36. *Inadi*, 106 S. Ct. at 1124.

37. *Inadi*, 748 F.2d at 815.

38. Federal Rule of Evidence 801(d)(2)(E) provides "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

39. *Inadi*, 106 S. Ct. at 1124.

40. *Id.*

41. *Id.* Marianne Lazaro and Michael McKeon were unindicted co-conspirators who testified under grants of use immunity. *United States v. Inadi*, 748 F.2d 812, 814-15 (3d Cir. 1984). William Levan was unavailable because he asserted his fifth amendment privilege. *Inadi*, 748 F.2d at 819 n.6.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

ments of Federal Rule of Evidence 801(d)(2)(E).⁴⁶

The Court of Appeals for the Third Circuit reversed, holding that Inadi's right of confrontation had been violated.⁴⁷ The court, relying on *Ohio v. Roberts*,⁴⁸ held that although Federal Rule of Evidence 801(d)(2)(E) had been satisfied, the right of confrontation established an *independent* requirement that unavailability of the declarant must be shown before the extrajudicial statement could be admitted.⁴⁹

The Supreme Court granted certiorari⁵⁰ to resolve the issue of whether the confrontation clause requires a showing of unavailability as a condition of admitting out-of-court declarations of co-conspirators although the statements satisfy the federal rule of evidence.⁵¹ The Court held that the confrontation clause does not require a showing of the co-conspirator's unavailability.⁵²

III. HISTORICAL BACKGROUND OF THE CONFRONTATION CLAUSE

A. Cases Prior to *Ohio v. Roberts*

In the late 1800's, the Supreme Court recognized that the primary objective of the confrontation clause was to prevent *ex parte* depositions and affidavits from being used against the accused in lieu of face-to-face confrontation before the jury.⁵³ In the leading case of *Mattox v. United States*,⁵⁴ the Court held:

46. *Id.*; see *supra* note 38.

47. *Id.*

48. 448 U.S. 56 (1980).

49. *Inadi*, 106 S. Ct. at 1124 (citing *Ohio v. Roberts*, 448 U.S. 56 (1980)).

50. 105 S. Ct. 2653 (1985).

51. *Inadi*, 106 S. Ct. at 1124.

52. *Id.* at 1129.

53. The Supreme Court has acknowledged that the vice which gave rise to the confrontation clause stemmed from the practice in England of trying defendants on "evidence" consisting solely of *ex parte* affidavits or depositions which denied the defendant the opportunity to challenge the accuser face-to-face before the trier of fact. Prosecutorial authorities would allege matters and offer proof by reading to the court such items as depositions, confessions of accomplices and letters. The accused would deny such matters and demand face-to-face confrontation with the witnesses. *California v. Green*, 399 U.S. 149, 156 (1970).

The trial of Sir Walter Raleigh for treason in 1603 is a famous example of this abuse. Crucial to the prosecution was the statement of a witness implicating Raleigh in a plot to seize the throne. Later, Raleigh received a written retraction from the witness and expected the witness to testify in his favor. A lengthy dispute ensued as to whether Raleigh could call the witness to testify on his behalf. The witness was not called and Raleigh was convicted and executed. The confrontation clause has been traced by some to the common-law reaction against such abuses. See F. HELLER, *THE SIXTH AMENDMENT* 104 (1951). A description of the trial is offered in Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100-01 (1972).

54. 156 U.S. 237 (1895).

The primary object of the [confrontation clause] . . . [is] not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.⁵⁵

In *Mattox*, the Court dealt with whether a court reporter's notes of crucial prior testimony, given by two prosecution witnesses at the defendant's earlier murder trial, could be accepted into evidence.⁵⁶ The witnesses died prior to the accused's retrial.⁵⁷ Holding that the defendant's constitutional rights had not been violated by admitting a copy of the stenographer's full report under oath because both witnesses had been fully examined and cross-examined at the prior trial in the presence of the accused,⁵⁸ the Court stated:

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . .

. . . .

The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.⁵⁹

The Court weighed its preference for face-to-face confrontation at trial against practical considerations of public policy and the necessities of the case.⁶⁰ It analogized the reliability of the deceased witnesses' statements to a dying declaration which had been an exception to the hearsay rules "from time immemorial."⁶¹ Because impending death presumably removes all temptations of falsehood and gives the statements the same weight as if made under oath, the Court reasoned that "there is equal if not greater reason for admitting testimony of [the witnesses'] statements which were made under oath."⁶²

Until recently, few decisions invoked the confrontation clause. This

55. *Id.* at 242-43.

56. *Id.* at 240.

57. *Id.*

58. *Id.* at 244.

59. *Id.* at 242-44.

60. *Id.* at 243.

61. *Id.*

62. *Id.* at 244.

lack of case law may be explained by the former inapplicability of the confrontation clause to the states.⁶³ However, in 1965, the Supreme Court held in *Pointer v. Texas*⁶⁴ that the confrontation clause was applicable to the states through the fourteenth amendment.⁶⁵

In *Pointer*, the petitioner was arrested for robbery and brought before a state judge for a preliminary hearing.⁶⁶ Pointer was not represented by counsel at the hearing nor did he cross-examine the complaining witness.⁶⁷ At trial, the transcript of the testimony of the state's chief witness at the preliminary hearing was admitted into evidence because the witness had moved to another state and did not intend to return.⁶⁸ Pointer objected, arguing that he was denied his right of confrontation.⁶⁹ The Court held that Pointer's confrontation rights had been violated by the use of the transcript.⁷⁰ The Court stated that it earlier had held in *Gideon v. Wainwright*⁷¹ that the sixth amendment's right to counsel was a fundamental right, and thus applicable to the states by the fourteenth amendment.⁷² Similarly, the sixth amendment's right of confrontation, including the right of cross-examination, was also held to be a fundamental right which the fourteenth amendment obligates the states to follow.⁷³ Stating that no one could seriously doubt that the right of the accused to confront witnesses against him included the right of cross-examination,⁷⁴ the Court quoted its holding in *Turner v. Louisiana*:⁷⁵

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."⁷⁶

However, the Court did not rule out admitting into evidence testi-

63. 5 J. WIGMORE, EVIDENCE § 1398 at 197 (3d ed. 1974).

64. 380 U.S. 400 (1965).

65. *Id.* at 403.

66. *Id.* at 401.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 408.

71. 372 U.S. 335 (1963).

72. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

73. *Id.* at 403.

74. *Id.* at 404.

75. 379 U.S. 466, 472-73 (1965).

76. *Pointer*, 380 U.S. at 405.

mony from all preliminary hearings stating that "[t]he case before us would be quite a different one had [the witness'] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine."⁷⁷ Thus, *Pointer* made the fundamental protection of the confrontation clause applicable to the states. The *Pointer* Court emphasized face-to-face confrontation, cross-examination and representation by counsel, without distinguishing the differences between preliminary hearings and trials.

In *Douglas v. Alabama*,⁷⁸ decided the same day as *Pointer*,⁷⁹ the petitioner claimed his confrontation rights were violated at the trial rather than at the preliminary hearing.⁸⁰ Douglas and an accomplice were tried separately in state court for assault with intent to murder.⁸¹ The accomplice was called as a state witness in Douglas' trial but repeatedly refused to testify on the ground of self-incrimination.⁸² The judge declared the accomplice a hostile witness and gave the prosecutor the privilege of cross-examination.⁸³

Under the guise of cross-examination to refresh the witness' memory, the prosecutor read aloud the accomplice's purported confession inculcating Douglas.⁸⁴ The prosecutor repeatedly asked the witness if he had made the statements, but the accomplice asserted his privilege and refused to answer.⁸⁵ The Court relied on *Mattox*⁸⁶ to support its holding that the object of the confrontation clause was to prevent depositions, or *ex parte* affidavits, from being used against the accused in lieu of personal examination and cross-examination of a witness.⁸⁷ The witness' alleged confession was the only direct evidence that Douglas had fired the weapon.⁸⁸ Coupled with the description of the surrounding events, the confession formed a crucial link in proving Douglas had committed the crime.⁸⁹ The Court held that Douglas' inability to cross-examine the ac-

77. *Id.* at 407.

78. 380 U.S. 415 (1965).

79. *Id.* at 418.

80. *Id.* at 416-17.

81. *Id.* at 416.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. 156 U.S. 237 (1895).

87. *Douglas*, 380 U.S. at 418-19 (citing *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

88. *Id.* at 419.

89. *Id.*

complice about the confession, along with the prosecutor's reading of it—which may have been treated by the jury as evidence that the confession was true—denied Douglas his right of cross-examination secured by the confrontation clause.⁹⁰ The Court reaffirmed that “[o]ur cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination. . . .”⁹¹

Three years later, in *Barber v. Page*,⁹² the Court further defined the requirements of the confrontation clause by adding unavailability as an important element and by distinguishing the right as basically a trial right.⁹³ Barber and a co-defendant were jointly charged with armed robbery.⁹⁴ At a preliminary hearing, the co-defendant's testimony incriminated Barber.⁹⁵ Although Barber was represented by counsel at the hearing, counsel did not cross-examine the co-defendant.⁹⁶ At trial, the state offered the preliminary hearing testimony as its principal evidence against Barber.⁹⁷ The testimony was offered based on the witness' unavailability since he was incarcerated in a federal prison in another state and was outside the court's jurisdiction.⁹⁸

Recognizing that the Court traditionally had made an exception to the confrontation requirement when a witness was unavailable but had given testimony subject to cross-examination at a previous judicial proceeding, the *Barber* Court stated that this exception arose from necessity.⁹⁹ For example, in *Mattox*, the witnesses who testified at the accused's earlier trial died prior to the re-trial.¹⁰⁰ The exception had

90. *Id.* at 418-20.

91. *Id.* at 418.

92. 390 U.S. 719 (1968).

93. *Id.* at 724-25.

94. *Id.* at 720.

95. *Id.*

96. *Id.* at 720. Both the petitioner and the co-defendant were initially represented by the same counsel at the preliminary hearing. *Id.* During the course of the hearing, the co-defendant waived his privilege against self-incrimination. *Id.* Counsel then withdrew as the co-defendant's attorney but continued to represent Barber. *Id.* The state argued that Barber was afforded the right of cross-examination but that he did not utilize it. *Id.* at 722. Although the Court assumed that Barber made a valid waiver of his right to cross-examination, it stated that such an assumption was open to considerable question. *Id.* In a footnote, the Court noted the dilemma of the attorney. *Id.* at 722 n.1. Presumably counsel and the co-defendant discussed the co-defendant's involvement in the crime and cross-examination would have revealed confidential communications. *Id.* Even if under state law the co-defendant waived the attorney-client privilege by testifying, the Court recognized that counsel was still confronted with serious ethical considerations under the circumstances. *Id.*

97. *Id.* at 720.

98. *Id.*

99. *Id.* at 722.

100. 156 U.S. 237 (1895).

been justified on the ground that the right of cross-examination initially afforded satisfied the purposes underlying the confrontation clause.¹⁰¹ But the *Barber* Court noted that the state had made absolutely no effort to secure the presence of the witness, other than to ascertain he was incarcerated in another state.¹⁰² *Barber* held that for the purposes of the exception to the confrontation requirement, a witness is not "unavailable" unless the prosecution has made a "good faith effort" to obtain the witness' presence at trial.¹⁰³ The Court stated that it would reach the same result even if counsel had cross-examined the witness at the preliminary hearing.¹⁰⁴ *Barber* noted that a preliminary hearing is a much less searching exploration into the merits of the case than a trial because a hearing's purpose is to determine whether probable cause exists to hold the accused for trial.¹⁰⁵ Distinguishing a preliminary hearing from a trial, the Court stated:

The right to confrontation is basically a *trial* right. It includes both the opportunity to cross-examine and the occasion for the *jury* to weigh the demeanor of the witness. . . . While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually *unavailable*, this is not . . . such a case.¹⁰⁶

The *Barber* Court appeared to retract its earlier suggestion in *Pointer*¹⁰⁷ that a defendant's confrontation rights would not be violated if the witness had been subject to cross-examination at a preliminary hearing.¹⁰⁸ The Court in *Barber* held that even if a witness has been fully cross-examined at a preliminary hearing, the admission of preliminary hearing testimony violates the defendant's confrontation right unless the prosecutorial authorities show through "good faith efforts" that they

101. *Barber*, 390 U.S. at 722.

102. *Id.* at 723. The Court acknowledged that previously courts and commentators had assumed that if a witness was outside a court's jurisdiction, it was sufficient grounds for dispensing with confrontation requirements because the court could not compel attendance. However, the Court stated that increased cooperation between the states and between the states and the federal government rendered this assumption invalid. The Court noted that if a witness was in federal custody, the federal courts had the power to issue writs of habeas corpus *ad testificandum* at the request of state prosecutors. In addition, it was the policy of the United States Bureau of Prisons to allow federal prisoners to testify in state criminal proceedings with these same writs issued by state courts. *Id.* at 723-24.

103. *Id.* at 724-25.

104. *Id.* at 725.

105. *Id.*

106. *Id.* at 725 (emphasis added).

107. 380 U.S. 400, 407 (1965); see *supra* text accompanying note 77.

108. 390 U.S. at 725.

tried to secure the presence of the witness.¹⁰⁹ Thus, *Barber* added to the confrontation clause the constitutional requirement of unavailability of a witness to the established requirement of cross-examination.

Two years later, in 1970, the Court again interpreted the requirements of the confrontation clause. In *California v. Green*,¹¹⁰ the Court found no constitutional objection to a state rule of evidence which permitted the use of prior inconsistent statements to be admitted for the truth of the matter asserted if the defendant was given an opportunity to cross-examine the witness at trial.¹¹¹ In *Green*, the chief prosecution witness testified against the defendant at a preliminary hearing in which the witness was extensively cross-examined.¹¹² However, the witness claimed a lapse of memory two months later at trial, stating that he was on drugs at the time of the crime.¹¹³ The prosecution read excerpts from the witness' prior testimony.¹¹⁴ Under the California Evidence Code, the evidence was admissible as substantive evidence.¹¹⁵ The Court held that the accused's confrontation rights had not been violated by admitting the witness' preliminary hearing testimony as long as the witness testified at trial and was subject to cross-examination.¹¹⁶

In its decision, the Court acknowledged that the purpose behind the confrontation clause was to insure that the accused has the right to be confronted by the witnesses against him.¹¹⁷ *Green* explained that the confrontation right was intended to accomplish three goals: (1) to insure that the statement is given under oath, thereby impressing upon the witness the seriousness of the situation and the sanctions against perjury; (2) to force the witness to be subjected to cross-examination; and (3) to allow the jury to observe the demeanor of the witness which aids it in assessing the witness' credibility.¹¹⁸ Even if the out-of-court statement is not subjected to these protections but the witness is present and testifies at trial about the statement, the Court concluded that the statement re-

109. *Id.*

110. 399 U.S. 149 (1970).

111. *Id.* at 164.

112. *Id.* at 151.

113. *Id.* at 152.

114. *Id.*

115. *Id.* California Evidence Code Section 1235 provides that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." CAL. EVID. CODE § 1235 (Deering 1987). Section 770 requires that the witness be given an opportunity to explain or deny the prior statement at some time in the trial. See CAL. EVID. CODE § 770 (Deering 1987).

116. *Green*, 399 U.S. at 164.

117. *Id.* at 157-58.

118. *Id.* at 158.

gains its lost protections because the witness is under oath and subject to cross-examination before the jury.¹¹⁹

In the second part of the opinion, the Court held that admission of preliminary hearing testimony satisfied the constitutional protections if the testimony was taken under oath, the accused was represented by counsel and counsel cross-examined the witness.¹²⁰ The Court stated:

We . . . think that [the witness'] preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For [the witness'] statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial.¹²¹

Since the witness' preliminary hearing testimony would have been admissible had the witness been unavailable despite good faith efforts to produce him, the Court reasoned that the testimony should be admitted when the witness is actually produced.¹²² The Court stated:

[I]t is untenable to construe the Confrontation Clause to permit the use of prior testimony to prove the State's case where the declarant never appears, but to bar that testimony where the declarant is present at the trial, exposed to the defendant and the trier of fact, and subject to cross-examination.¹²³

The Court noted that it suggested this reasoning in *Pointer v. Texas*¹²⁴ when it said that the result would have been different had the witness' statement been taken at a "full-fledged hearing" in which the defendant had been represented by counsel who had an opportunity to cross-examine the witness.¹²⁵

Therefore, *Green* established: (1) that an out-of-court statement not subject to any of the protections of the confrontation clause, which is admitted for its truth, satisfies the confrontation requirement if the wit-

119. *Id.* at 158-59. Justice Harlan, in a concurring opinion, criticized the equation of the right of cross-examination with the meaning of confrontation. *Id.* at 173 (Harlan, J., concurring). He proposed that the critical element in the confrontation requirement was availability of the witness. Harlan argued that the confrontation protection requires the production of a witness when he is available to testify. *Id.* at 182-83 (Harlan, J., concurring) (citing *West v. Louisiana*, 194 U.S. 258 (1904)). Harlan retreated from this position six months later in *Dutton v. Evans*, 400 U.S. 74 (1970) (Harlan, J., concurring). See *infra* note 156.

120. *Green*, 399 U.S. at 165.

121. *Id.*

122. *Id.*

123. *Id.* at 166-67.

124. 380 U.S. 400, 407 (1965).

125. *Green*, 399 U.S. at 165-66.

ness is produced at trial, testifies under oath and is subject to cross-examination before the trier of fact¹²⁶ and (2) if the witness is unavailable at trial, the preliminary hearing testimony is admissible if given under oath and subject to cross-examination.¹²⁷ Thus, *Green* deemphasized the distinction between preliminary hearing testimony and trial testimony which *Barber* had recognized only two years earlier.¹²⁸

In *Dutton v. Evans*,¹²⁹ a case decided only six months after *Green*, the Court addressed another state evidentiary rule which the accused claimed violated his confrontation rights. In *Dutton*, the state introduced

126. *Id.* at 158.

127. *Id.* at 165-68.

128. In his dissent, Justice Brennan argued that for purposes of the confrontation clause no significant difference existed between a witness who fails to testify because he is unwilling to do so, and a witness whose inability to remember silences his testimony. Brennan argued that in both instances the jury may view the demeanor of the witness at trial. However, the purpose of cross-examination which is crucial to the confrontation clause is not satisfied because the witness cannot be questioned about pertinent facts contained in the out-of-court statements. *Id.* at 193-94 (Brennan, J., dissenting) (citing *Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965)).

Brennan listed numerous reasons why examination at a preliminary hearing rarely approximates that of a trial, and therefore, does not satisfy the confrontation requirements. He noted:

- (1) The objective of the hearing is to establish whether probable cause exists, a much lighter burden than proof beyond a reasonable doubt;
- (2) Neither the defense nor the prosecution is anxious before trial to disclose its case by extensive examination at the preliminary hearing;
- (3) The schedules of both the court and counsel cannot accommodate lengthy preliminary hearings;
- (4) Even if no concern arises about schedules, generally neither the defense nor the prosecution has had an adequate opportunity to prepare extensive examination before the hearing;
- (5) Even if extensive examination of the witnesses has occurred, the factfinder would receive this information second hand so that the witness' demeanor, a significant factor in weighing the testimony, would be lost;
- (6) Since the atmosphere and stakes are different in the two proceedings, witnesses may be more careless in their testimony at a preliminary hearing than at trial. Also, the witnesses may be more willing to perjure themselves when the consequences are that the accused will stand trial than when the consequences will condemn the accused to loss of freedom. *Id.* at 197-99 (Brennan, J., dissenting).

Brennan stated:

In short, [the majority] ignores reality to assume that the purposes of the Confrontation Clause are met during a preliminary hearing. Accordingly, to introduce preliminary hearing testimony for the truth of the facts asserted, when the witness is in court and either unwilling or unable to testify regarding the pertinent events, denies the accused his Sixth Amendment right to grapple effectively with incriminating evidence.

Id. at 199 (Brennan, J., dissenting).

129. 400 U.S. 74 (1970). Justice Stewart, writing for the Court, was joined by Justices Burger, White and Blackmun. Justice Blackmun, joined by Justice Burger, filed a concurring opinion. Justice Harlan filed an opinion concurring in the result. Justice Marshall, writing for the dissent, was joined by Justices Black, Douglas and Brennan. *Id.* at 75.

a co-conspirator's statement made to the testifying witness under a state hearsay exception.¹³⁰ The defendant, Evans, and accomplice, Williams, were charged with murder.¹³¹ While the accomplice was in prison, a fellow prisoner, Shaw, inquired how Williams had fared at his arraignment.¹³² Williams responded, "[i]f it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."¹³³ This statement was admitted into evidence under a state hearsay exception at Evans' trial.¹³⁴ Evans challenged the hearsay exception allowing the co-conspirator's extrajudicial statements made during the concealment phase of a conspiracy to be admitted at trial.¹³⁵

A plurality¹³⁶ held that according to the circumstances of the case, the admission of the out-of-court statement did not violate the confrontation clause.¹³⁷ The Court focused on the reliability of Shaw rather than on the fact that Williams had not been subject to confrontation by Evans.¹³⁸ The Court, referring to Shaw's testimony, stated: "From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen *but also as to*

130. *Id.* at 78.

131. *Id.* at 76.

132. *Id.* at 77.

133. *Id.*

134. *Id.* at 78. The Georgia statute provides that "[a]fter the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." GA. CODE ANN. § 38-306 (1981). This statute extended the co-conspirator exception to include statements made during the concealment phase of the crime. The Federal Rules of Evidence restrict the exception to statements made "during the course of" the conspiracy. See FED. R. EVID. 801(d)(2)(E) advisory committee's note. The Advisory Committee noted that "[t]he limitation upon the admissibility of statements of co-conspirators to those made 'during the course . . . of the conspiracy' is in the accepted pattern." *Id.*

135. *Dutton*, 400 U.S. at 80-83. The accused challenged the state hearsay exception on two grounds. *Id.* First, he contended that the state rule was invalid under the confrontation clause because it did not coincide with the narrower federal exception. *Id.* at 80. Second, he argued that admission of the out-of-court declaration denied him the right to confront a witness against him, in violation of the confrontation clause. *Id.* at 83.

136. Justice Harlan concurred with the plurality of four justices in denying that the accused's right of confrontation had been violated. *Id.* at 93 (Harlan, J., concurring); see *supra* note 119.

137. *Id.* at 83. The Court held that the state hearsay exception is not invalid under the confrontation clause merely because it does not coincide with the federal exception. *Id.* The federal rules are a result of the Court's rule-making power in the area of federal evidence law and do not emanate from the sixth amendment. *Id.* at 82-83. The Court also held that admission of noncrucial evidence in this case did not serve to deny the accused's confrontation right because the out-of-court declarations bore "indicia of reliability." *Id.* at 87-89.

138. *Dutton*, 400 U.S. at 88.

what he has heard."¹³⁹

Although Shaw's out-of-court statement was admitted pursuant to the state rule of evidence, the Court's evidentiary analysis "stood the law of hearsay on its head."¹⁴⁰ The Court took the unprecedented step of declaring that a reliable informant may offer information for its truth regarding what he has heard although the statement does not fall within a judicially recognized hearsay exception.¹⁴¹ The Court reasoned that Shaw's testimony regarding Williams' statement which implicated the defendant as the perpetrator of the murders was reliable because: (1) the statement was not an assertion about a past fact and thus the jury would be warned not to give it undue weight; (2) it had been "abundantly established" that Williams had personal knowledge of the crime and its participants; (3) it was extremely doubtful that Williams' statement was founded on faulty recollection; and (4) the statement was spontaneous and against Williams' penal interest.¹⁴² These factors were considered "indicia of reliability," allowing Shaw's statement about what he heard to be admitted for its truth, even though Williams had not been confronted by Evans.¹⁴³ The Court established that noncrucial hearsay possessing sufficient "indicia of reliability . . . may be placed before the jury *though there is no confrontation of the declarant.*"¹⁴⁴ Thus, the Court completely shifted its focus away from the availability of the declarant and the requirement of cross-examination.

Distinguishing *Dutton* from previous cases such as *Pointer*,¹⁴⁵ *Douglas*¹⁴⁶ and *Barber*,¹⁴⁷ the Court noted that the evidence was neither "cru-

139. *Id.* (emphasis added).

140. Natali, *Green, Dutton and Chambers: Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43, 51 (1975).

141. *Dutton*, 400 U.S. at 88. Professor Louis Natali, strongly criticizing Justice Stewart's statement that a reliable informant may offer information for its truth regarding what he has heard, wrote:

This incredible redefining of the hearsay rule was accomplished without a single citation to history, precedent or commentary. Justice Stewart blithely ignored the purpose for which the statement was offered. The statement, offered to prove the truth of the matter asserted therein, was hearsay and could only be admitted under some judicially approved exception that guaranteed its trustworthiness. . . . His [Stewart's] reasoning would let in any hearsay, pursuant to a state exception, that satisfied the requirements of (1) an oath, (2) cross-examination and (3) jury observation of demeanor. Justice Stewart is plainly wrong. The hearsay rule demands that the declarant be present in court unless the court has recognized an exception to the rule.

Natali, *supra* note 140, at 51-52 (footnotes omitted).

142. *Dutton*, 400 U.S. at 88-89.

143. *Id.* at 89.

144. *Id.* (emphasis added).

145. 380 U.S. 400 (1965); see *supra* text accompanying notes 64-77.

146. 380 U.S. 415 (1965); see *supra* text accompanying notes 78-91.

147. 390 U.S. 719 (1968); see *supra* notes 92-109 and accompanying text.

cial" nor "devastating" as it had been in the other cases.¹⁴⁸ The Court stated that "no less than 20 witnesses appeared and testified for the prosecution" and the defendant's counsel was "given full opportunity to cross-examine every one of them."¹⁴⁹ The focus was on the triviality of the testimony.¹⁵⁰ Shaw's testimony was "of peripheral significance at most."¹⁵¹ Justice Blackmun, in his concurring opinion, stated that if error exists, it was harmless error.¹⁵²

Apparently abandoning the confrontation protection to defendants in cases where the witness' testimony bore "indicia of reliability" and the out-of-court statement was not crucial to the prosecution's case, the Court reduced the constitutional protection to a practical matter for determining the truth. The Court stated: "[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'"¹⁵³ Thus, in *Dutton*, the Court retreated from its earlier position that the confrontation clause bars uncross-examined hearsay from available declarants.¹⁵⁴ *Dutton* found no confrontation violation in the admission of a hearsay statement made by a co-conspirator inculcating the defendant even though the declarant was not cross-examined at trial or at a preliminary hearing.¹⁵⁵ There was *no* mention of whether the prosecution had sought to obtain the presence of the co-conspirator.¹⁵⁶ Ap-

148. *Dutton*, 400 U.S. at 87.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 90, 93 (Blackmun, J., concurring). Professor Natali wrote:

The Court distinguished [prior] cases from *Dutton* in a manner that permitted the harmless error tail to wag the sixth amendment dog. It noted at the outset that the evidence at issue in this case was neither "crucial" nor "devastating." . . . The plurality sought to bolster its backdoor reasoning by emphasizing . . . that the evidence was only of "peripheral significance." The harmless error test was transparently in control, as evidenced by the emphasis on the content of the testimony under the veil of a constitutional analysis of admissibility.

Natali, *supra* note 140, at 50-51 (footnotes omitted).

153. *Dutton*, 400 U.S. at 89 (quoting *California v. Green*, 399 U.S. 149, 161 (1970)).

154. The Court established in *Barber v. Page* that for purposes of the confrontation clause, a witness is not "unavailable" unless the prosecution has made a good faith effort to obtain his presence at trial. 390 U.S. 719, 724-25 (1968). See *supra* notes 92-109 and accompanying text.

155. *Dutton*, 400 U.S. at 88-89.

156. Justice Harlan retreated from his position in *Green*, finding that the confrontation clause was designed to establish the rule that available witnesses must be presented at trial. 399 U.S. at 174 (Harlan, J., concurring). He stated that this analysis of the confrontation clause would "significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to the defendant." *Dutton*, 400 U.S. at 95-96 (Harlan, J., concurring). He noted that

parently, the Court gave a flexible interpretation to the confrontation clause by taking into account the specific circumstances of the case, rather than by relying on the principles it had previously announced in *Pointer*,¹⁵⁷ *Douglas*¹⁵⁸ and *Barber*.¹⁵⁹

B. Ohio v. Roberts

In 1980, ten years after *California v. Green*¹⁶⁰ and *Dutton v. Evans*,¹⁶¹ the Court in *Ohio v. Roberts*¹⁶² clearly established the sweeping requirement of declarant unavailability for admission of an out-of-court statement at trial.¹⁶³ In *Roberts*, the accused was charged with check forgery and possession of stolen credit cards.¹⁶⁴ Roberts claimed he had been given a friend's parents' checkbook and credit cards with the understanding that he was permitted to use them.¹⁶⁵ At a preliminary hearing in which the friend was called as a defense witness, counsel for Roberts asserted through leading questions that the witness had permitted Roberts to use the checks and credit cards.¹⁶⁶ The witness denied this assertion.¹⁶⁷ The prosecution did not cross-examine the witness.¹⁶⁸ Since the witness' whereabouts were unknown by family and friends, the witness could not be produced at trial despite the fact that the state had subpoenaed her five times at her parent's residence.¹⁶⁹ The prosecution, relying on a state statute¹⁷⁰ which permitted the use of preliminary hearing

this interpretation would eliminate hearsay exceptions such as business records, official statements, learned treatises and trade reports. *Id.* at 96 (Harlan, J., concurring). Justice Harlan stated that the confrontation clause was not well designed for analyzing the constitutionality of rules of evidence. *Id.* (Harlan, J., concurring). He offered that federal and state rules of evidence should be tested in accordance with the due process clauses of the fifth and fourteenth amendments. *Id.* at 96-97 (Harlan, J., concurring).

157. 380 U.S. 400 (1965); see *supra* text accompanying notes 64-77.

158. 380 U.S. 415 (1965); see *supra* text accompanying notes 78-91.

159. 390 U.S. 719 (1968); see *supra* notes 92-109 and accompanying text.

160. 399 U.S. 149 (1970); see *supra* notes 110-28 and accompanying text.

161. 400 U.S. 74 (1970); see *supra* notes 129-59 and accompanying text.

162. 448 U.S. 56 (1980); see *supra* notes 162-87 and accompanying text.

163. *Roberts*, 448 U.S. at 65-66.

164. *Id.* at 58.

165. *Id.* at 59.

166. *Id.* at 58.

167. *Id.*

168. *Id.*

169. *Id.* at 59.

170. *Id.* at 59 n.2. The statute provides:

Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testi-

testimony when the witness could not be produced at trial, offered the transcript of the witness' testimony.¹⁷¹ The trial court admitted the transcript into evidence.¹⁷² Defense counsel claimed this violated the accused's confrontation rights.¹⁷³

Relying on *Mattox v. United States*,¹⁷⁴ the *Roberts* Court held that the confrontation clause envisions personal examination and cross-examination of the witness.¹⁷⁵ The Court established a two-prong test to determine when hearsay statements may be admitted.¹⁷⁶ The first prong of the test normally requires a showing of unavailability of the declarant.¹⁷⁷ *Roberts* noted that the basic litmus test for unavailability is a "good faith effort" on the part of the prosecutorial authorities.¹⁷⁸ The Court stated:

mony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

OHIO REV. CODE ANN. § 2945.49 (1975).

171. *Roberts*, 448 U.S. at 59.

172. *Id.* at 60.

173. *Id.* at 59. The Ohio Court of Appeal reversed the conviction on the basis that the prosecution had not made a "good faith effort" to secure the presence of the witness. *Id.* at 60. The Ohio Supreme Court affirmed the reversal on another ground. *Id.* The court held that the transcript violated the defendant's confrontation rights because the witness had not been cross-examined by the prosecution at the preliminary hearing. *Id.* at 60-62.

174. 156 U.S. 237 (1895).

175. 448 U.S. at 63-64 (citing *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

176. *Id.* at 65.

177. *Id.* The Court, relying on *Dutton*, noted that a demonstration of unavailability is not always required. *Id.* at 65 n.7. For example, unavailability is not required if the court finds the utility of trial confrontation to be sufficiently remote. *Id.* (citing *Dutton v. Evans*, 400 U.S. 74 (1970)). However, the Court failed to formulate any standards for determining when the unavailability requirement is excused.

This rule of unavailability appears to be the position Justice Harlan embraced in *California v. Green*, 399 U.S. 149, 172 (1970) (Harlan, J., concurring), but abandoned only six months later in *Dutton v. Evans*, 400 U.S. 74, 93 (1970). See *supra* notes 110-28 and accompanying text for a discussion of *Green* and notes 129-59 and accompanying text for a discussion of *Dutton*. In his concurring opinion in *Green*, Justice Harlan wrote that "the Confrontation Clause of the Sixth Amendment . . . require[s] the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial." *Green*, 399 U.S. at 174 (Harlan, J., concurring) (emphasis in original). However in *Dutton*, Justice Harlan said that he was not content with the position he had taken in *Green*. He wrote that "[a] rule requiring production of available witnesses would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant." *Dutton*, 400 U.S. at 95-96 (Harlan, J., concurring).

178. *Roberts*, 448 U.S. at 74 (citing *Barber v. Page*, 390 U.S. 719, 724-25 (1968)). The Court, recognizing that it had not refined this rule in earlier cases, stated general propositions that emerge from the rule. The Court said that the law does not require that futile acts be taken. *Id.* Therefore, if no possibility exists of procuring the witness' presence, "good faith" does not demand anything of the prosecution. *Id.* However, if a possibility exists, even remote, that actions taken may produce the declarant, then the obligation of good faith may demand that the prosecution take action. *Id.* The question of "good faith efforts" is one of

"[I]n conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. . . . [T]he prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."¹⁷⁹

The second prong—requiring a statement to possess "indicia of reliability"—operates *only once the declarant is shown to be unavailable*.¹⁸⁰ The Court, recognizing that hearsay rules and the confrontation clause were designed to protect similar values and stemmed from the same roots, held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."¹⁸¹ Having established the two-prong test, *Roberts* held that the preliminary hearing testimony was admissible because the witness was unavailable¹⁸² and the statement bore indicia of reliability.¹⁸³ The Court found that the questioning of the witness in *Roberts* comported with the *form* and *purpose* of cross-examination.¹⁸⁴ Defense counsel's questioning on direct-examination took on the form of cross-examination because his questioning was "replete with leading questions."¹⁸⁵ The examination comported with the purpose of cross-examination by challenging the witness' truthfulness.¹⁸⁶ Thus, the Court said that the questioning of the witness, regardless of whether it was on direct or cross-examination, complied with the purpose behind the confrontation clause.¹⁸⁷

The two-prong test announced in *Ohio v. Roberts* established a balance between the competing interests of the confrontation clause and the law of hearsay. *Roberts* appeared to put to rest the almost century long uncertainty regarding when an out-of-court statement may be admitted absent the declarant. Against this background, the *United States v. Inadi* decision is analyzed.

reasonableness, and the prosecution bears the burden of demonstrating that it has made a reasonable effort. *Id.* at 74-75.

179. *Id.* at 65.

180. *Id.* at 66.

181. *Id.*

182. *Id.* at 75.

183. *Id.* at 73.

184. *Id.* at 70-71.

185. *Id.* Cross-examination, in contrast to direct-examination, is often conducted by leading questions. The main purpose of cross-examination is to weaken direct testimony and usually the witness is presumed to be uncooperative. MCCORMICK, *supra* note 21, at 50.

186. *Roberts*, 448 U.S. at 71.

187. *Id.* at 70-71.

IV. REASONING OF THE COURT

A. *The Majority Opinion*

In *United States v. Inadi*,¹⁸⁸ the Supreme Court held that the confrontation clause does not require a showing of unavailability as a condition to admission of a co-conspirator's out-of-court declarations.¹⁸⁹ The majority¹⁹⁰ rejected the court of appeals' reliance on *Ohio v. Roberts*¹⁹¹ for the proposition that "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."¹⁹² The *Inadi* Court cautioned that the Third Circuit's interpretation of *Roberts* would mean that "no out-of-court statement would be admissible without a showing of unavailability."¹⁹³ The Court stated that this interpretation would effectuate a "wholesale revision of the law of evidence" and would too broadly interpret the confrontation clause.¹⁹⁴ The majority in *Inadi* disclaimed any intention in *Roberts* of proposing a general rule of unavailability.¹⁹⁵ The Court announced that the unavailability rule set forth in *Roberts* applied only to prior judicial proceedings.¹⁹⁶ The Court stated:

Roberts must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that *Roberts* simply reaffirmed a longstanding rule . . . that applies unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.¹⁹⁷

The *Inadi* Court reasoned that the unavailability requirement was inapplicable to co-conspirators' extrajudicial statements by distinguishing co-conspirators' statements from former testimony.¹⁹⁸ Focusing on the similarities between prior testimony and live testimony, the Court

188. 106 S. Ct. 1121 (1986). See *supra* notes 19-52 and accompanying text for a discussion of the facts of *United States v. Inadi*.

189. 106 S. Ct. at 1129.

190. Justice Powell wrote the opinion in which Chief Justice Burger and Justices White, Blackmun, Rehnquist, Stevens and O'Connor joined. Justice Marshall wrote the dissenting opinion in which Justice Brennan joined. *Id.* at 1123.

191. 448 U.S. 56 (1980). See *supra* notes 11-15, 162-87 and accompanying text.

192. *Inadi*, 106 S. Ct. at 1125 (quoting *Ohio v. Roberts*, 448 U.S. 56, 65 (1980)).

193. *Id.* at 1125.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 1126 (footnote omitted).

198. *Id.* at 1126-27.

found that former testimony was merely a "weaker substitute for live testimony."¹⁹⁹ Consequently, the Court stated that when a party may present either former testimony or live testimony, the "better evidence" is the live testimony which can be cross-examined before the trier of fact.²⁰⁰ However, the *Inadi* Court found that the same principles do not apply to co-conspirators' out-of-court statements.²⁰¹ The *Inadi* Court focused on the qualitative difference between statements made during the conspiracy and testimony at trial which gives the extrajudicial statements independent evidentiary value.²⁰² Noting that the relationship between the co-conspirators will have changed substantially between the time the relationship was formed and trial, the Court stated:

Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand.

. . . The declarant and the defendant will have changed from partners in an illegal conspiracy to suspects or defendants in a criminal trial, each with information potentially damaging to the other. . . . [I]t is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force.²⁰³

Several reasons were given for finding little value in requiring unavailability as an element of the co-conspirator exception. First, the Court stated that out-of-court statements of co-conspirators are admissible whether the declarants are available and produced by the prosecution or unavailable.²⁰⁴ The Court stated that if the co-conspirator declarants are in fact unavailable, their out-of-court statements are admissible.²⁰⁵ In *Inadi*, the extrajudicial statements of William Levan,²⁰⁶ an unindicted co-conspirator, were admissible because he invoked his fifth amendment privilege and thereby rendered himself unavailable.²⁰⁷ If the co-conspirator declarants are available and produced at trial, their out-of-court state-

199. *Id.* at 1126.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1126-27.

204. *Id.* at 1127. The Court did not cite any support for this "reason." Apparently, the Court's reasons are actually conclusions which it has drawn.

205. *Id.* See *supra* note 14 for the Federal Rules of Evidence definition of unavailability. See *infra* text accompanying notes 316-41 for a discussion of the Court's reasoning.

206. See *supra* text accompanying notes 24-27.

207. A witness' exercise of a privilege not to testify renders the witness unavailable to the extent of the scope of the privilege. McCORMICK, *supra* note 21, at 754. See FED. R. EVID. 804(a)(1), see *supra* note 14 for the text of Federal Rule of Evidence 804(a).

ments are admissible. The *Inadi* Court found that the extrajudicial statements of Michael McKeon²⁰⁸ and Marianne Lazaro,²⁰⁹ two co-conspirators who testified under immunity, were admissible because they were available and produced at trial.²¹⁰ Therefore, the Court ruled that the unavailability rule does not exclude co-conspirator's extrajudicial declarations unless the prosecution errs in failing to produce an available declarant.²¹¹

Second, the Court reasoned that an unavailability rule would not likely produce significant testimony from co-conspirators that would contribute to the "truth determining process" because declarants important to the prosecution or defense already will have been subpoenaed.²¹² The Court noted that only those declarants which neither side thought would be helpful would not have been called.²¹³ The Court indicated that John Lazaro,²¹⁴ an unindicted co-conspirator, was in this latter position since neither the prosecution nor the defense subpoenaed him as a witness.²¹⁵ In a footnote, the Court observed that probably neither side wanted Lazaro to testify.²¹⁶ The prosecution may not have wanted to call Lazaro because he may have been facing indictment or trial, and would have had little incentive to help them.²¹⁷ The defense may not have wanted to subpoena Lazaro because his interests no longer coincided with *Inadi*'s.²¹⁸ Each could expose information that was harmful to the other.²¹⁹ The Court noted the fact that *Inadi* did nothing to secure Lazaro's testimony and had several options available to attack Lazaro's extrajudicial statements.²²⁰ *Inadi* pointed out that under Federal Rule of Evidence 806,²²¹ the defendant could have attacked the credibility of

208. See *supra* text accompanying notes 21-27.

209. See *supra* text accompanying note 31-35.

210. *Inadi*, 106 S. Ct. at 1127.

211. *Id.* See *infra* text accompanying notes 316-17 for a discussion of the Court's reasoning.

212. *Id.*

213. *Id.*

214. See *supra* text accompanying notes 25-46.

215. *Inadi*, 106 S. Ct. at 1127.

216. *Id.* at 1127 n.7.

217. *Id.* at 1126.

218. *Id.* at 1127 n.7.

219. *Id.*

220. *Id.* at 1127.

221. Rule 806 provides:

When a hearsay statement, or a statement defined in Rule 801(d)(2),(C),(D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. . . . If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Lazaro by any evidence that would have been admissible if Lazaro had testified.²²² Also, if Inadi chose to call Lazaro as a witness, Inadi would have been entitled under Rule 806 to examine Lazaro as if under cross-examination.²²³ The defendant would not have had to establish that Lazaro was a hostile witness, although that option was available to him.²²⁴ The Court also noted that the compulsory process clause of the sixth amendment²²⁵ would have aided Inadi in obtaining the testimony of any witness in his favor.²²⁶ Thus, the Court concluded that if the prosecution does not want to call a co-conspirator declarant and the defense does not choose to subpoena a co-conspirator declarant as either a favorable or hostile witness, then little is gained by a rule requiring the prosecution to make the declarant available before admitting his extrajudicial statements.²²⁷

Third, the *Inadi* Court contrasted the few benefits of an unavailability rule for the co-conspirator exception to the large burden it would place on the criminal justice system.²²⁸ The Court stated that "[a] constitutional rule requiring a determination of availability every time the prosecution seeks to introduce a co-conspirator's declaration automatically adds another avenue of appellate review in these complex cases."²²⁹ The Court recognized that since the co-conspirator rule is such a frequently used exception²³⁰ to the hearsay rule, a requirement of determining the declarant's availability would "impose a substantial burden on

FED. R. EVID. 806.

222. *Inadi*, 106 S. Ct. at 1127-28.

223. *Id.*; see *supra* note 185.

224. *Inadi*, 106 S. Ct. at 1127-28. The trial court has the discretion to decide whether a witness is "hostile," thereby giving counsel the right to cross-examine his own witness. *Commonwealth v. Barber*, 418 A.2d 653, 657 (1980). The following requirements must be met for counsel to cross-examine his own witness: (1) the witness' testimony must be unexpected; (2) the testimony must contradict previous statements made by the witness; (3) the testimony must harm the party calling the witness and benefit the opposing side; and (4) the scope of the cross-examination may not be excessive. *Commonwealth v. Barber*, 418 A.2d at 657 (1980).

225. U.S. CONST. amend. VI, cl. 3. The clause reads as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor"

226. *Inadi*, 106 S. Ct. at 1128; see *infra* text accompanying notes 326-33.

227. *Inadi*, 106 S. Ct. at 1128. The Court's rationale appears to be a guise for its conclusions. See *infra* text accompanying notes 316-41 for an analysis of the Court's "reasoning."

228. *Inadi*, 106 S. Ct. at 1128.

229. *Id.*

230. In a footnote, the Court noted that co-conspirator's out-of-court statements are characterized in Federal Rule of Evidence 801 as exemptions from, rather than exceptions to, the hearsay rule. *Id.* at 1128 n.12. The Court stated that regardless of their characterization, the same confrontation clause principles apply. *Id.*; see *supra* note 3.

the entire criminal justice system."²³¹

Finally, the Court reasoned that with the co-conspirator exception, the unavailability rule placed a significant burden on the prosecution because it would have to identify and locate each declarant, and then keep track of them to ensure their availability at trial.²³² *Inadi* stated that in situations in which co-conspirators are incarcerated, the requirement of producing them at trial burdens prison officials and increases the risk of escapes.²³³ Therefore, from a practical standpoint, the unavailability rule would greatly burden the prosecution and only marginally benefit the defendant.²³⁴

Inadi pointed out that the defendant's confrontation argument required the Court to readdress the issue of the admissibility of co-conspirator's extrajudicial statements which had been raised in *Dutton v. Evans*,²³⁵ another co-conspirator case. The *Inadi* Court indicated that the *Dutton* plurality²³⁶ found that the accused's confrontation right had not been violated by admitting the co-conspirator's extrajudicial statement into evidence even though the co-conspirator declarant was not produced at trial.²³⁷ *Inadi* stated that it would continue to decline to require a showing of the declarant's unavailability as a condition to admitting the extrajudicial statements.²³⁸

B. Dissenting Opinion

Justices Marshall and Brennan dissented from the majority's holding that the unavailability rule was not applicable to co-conspirators' out-of-court statements.²³⁹ Justice Marshall, writing for the dissent, criticized the majority in a four-part analysis. In the first part, the dissent attacked the majority's position that *Ohio v. Roberts*²⁴⁰ two-prong test of unavailability and reliability was limited to prior judicial testimony.²⁴¹ The dissenting opinion, quoting Justice Blackmun's affirmance of the requirements of unavailability and reliability in *Roberts*, stated that "[t]he Court has not sought to 'map out a theory of the Confrontation Clause

231. *Id.* at 1128.

232. *Id.*

233. *Id.*

234. *Id.* at 1129.

235. 400 U.S. 74 (1970). See *supra* notes 129-59 and accompanying text for a discussion of *Dutton v. Evans*.

236. See *supra* note 129.

237. *Inadi*, 106 S. Ct. at 1129.

238. *Id.*

239. *United States v. Inadi*, 106 S. Ct. 1121, 1125-26 (1986).

240. 448 U.S. 56 (1980).

241. *Inadi*, 106 S. Ct. at 1129-31 (Marshall, J., dissenting).

that would determine the validity of all . . . hearsay "exceptions." ' But a general approach to the problem is discernible."²⁴² Justice Marshall noted that in *Roberts*, the Court had reviewed many earlier cases construing the relationship between the confrontation clause and the hearsay exceptions before announcing its rule that "the Sixth Amendment establishes a rule of necessity. . . . [T]he prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."²⁴³ Justice Marshall wrote that "[t]his sweeping language was in no way limited to any particular variety of out-of-court declarations [The majority's] effort to confine *Roberts* misconstrues both the meaning of that decision and the essential command of the Confrontation Clause."²⁴⁴

The dissent argued that co-conspirators' extrajudicial statements admitted for their truth are not so inherently reliable that cross-examination is unnecessary to guarantee their trustworthiness.²⁴⁵ Agreeing with the majority that co-conspirators will speak differently to each other while engaged in the conspiracy than when testifying in court,²⁴⁶ the dissent urged that this difference "cannot possibly be a guarantee, or even an indicium, of [the out-of-court statements'] reliability."²⁴⁷

Since criminals are not "notorious for their veracity" in dealing with each other, the dissent reasoned that co-conspirators' statements made in the course of the conspiracy are often unreliable.²⁴⁸ Justice Marshall wrote that co-conspirators' extrajudicial statements are unreliable not only because of the "duplicitous with which criminals often conduct their business" but also because "ambiguities . . . appear in all casual conversations."²⁴⁹ Reasoning that co-conspirators' out-of-court statements are even more likely to be plagued with ambiguities because co-conspirators often speak in slang and use private codes, the dissent advocated the appearance of co-conspirators in court to afford the prosecution and the defense the opportunity to eliminate ambiguities.²⁵⁰

242. *Id.* at 1130 (Marshall, J., dissenting) (citations omitted) (quoting *Ohio v. Roberts*, 448 U.S. at 56, 64-65 (1980)).

243. *Id.* (Marshall, J., dissenting) (quoting *Ohio v. Roberts*, 448 U.S. 56, 65 (1980)).

244. *Id.* (Marshall, J., dissenting).

245. *Id.* at 1131-32 (Marshall, J., dissenting).

246. *Id.* at 1131 (Marshall, J., dissenting).

247. *Id.* (Marshall, J., dissenting).

248. *Id.* (Marshall, J., dissenting) (quoting *Levie, Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1166 (1954)).

249. *Id.* at 1132 (Marshall, J., dissenting).

250. *Id.* (Marshall, J., dissenting). See Note, *Federal Rule Of Evidence 801(d)(2)(E) And The Confrontation Clause: Closing The Window Of Admissibility For Coconspirator Hearsay*, 53 FORDHAM L. REV. 1291 (1985); Comment, *Testing The Reliability Of Coconspirators'*

The dissent further doubted the reliability of co-conspirators' statements by pointing out that unlike many other types of statements excepted from the rule due to their reliability,²⁵¹ the co-conspirator exception is not based on the belief that these statements are inherently reliable.²⁵² Rather, the exception is based on the "agency theory" which posits that once the conspiracy is established, the act of one conspirator in furtherance of the conspiracy is attributable to all and may be used as evidence against each member.²⁵³ The dissent indicated that the agency theory has been discarded as "at best a fiction."²⁵⁴ Thus, the co-conspirator exception does not serve to further the confrontation clause's goal of placing reliable information before the trier of fact.²⁵⁵

In the second part of the analysis, the dissent did not disagree with the majority that co-conspirators' out-of-court statements are qualitatively different than co-conspirator's statements made at trial.²⁵⁶ However, the dissent asserted that this fact should not exclude co-conspirators' extrajudicial statements from the requirement of unavailability and reliability.²⁵⁷ Justice Marshall observed:

I truly cannot understand the majority's fear that a rule requiring the prosecution to do its best to produce a co-conspirator declarant in court would somehow deprive triers of fact of valuable evidence. . . . The majority's fear must . . . stem from a notion that if the prosecution is able to produce the declarant in court, his presence will somehow prevent the jury from hearing the truth.²⁵⁸

The dissent pointed out that even with the unavailability requirement, declarants' out-of-court statements would still be admissible as long as the prosecution made a good faith effort to produce the declarant, and as long as the statements possessed adequate "indicia of reliability."²⁵⁹ Justice Marshall argued that the requirement of producing declarants would add to, rather than inhibit, the truth determining process

Statements Admitted Under Federal Rule Of Evidence 801(d)(2)(E): Putting The Claws Back In The Confrontation Clause, 30 VILL. L. REV. 1565 (1985).

251. *Inadi*, 106 S. Ct. at 1132 (Marshall, J., dissenting).

252. *Id.*

253. *Id.* (Marshall, J., dissenting) (citing *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 469 (1827)).

254. *Id.* (Marshall, J., dissenting) (quoting Advisory Committee on Fed. Rule Evid. 801(d)(2)(E)).

255. *Id.* (Marshall, J., dissenting).

256. *Id.* (Marshall, J., dissenting).

257. *Id.* (Marshall, J., dissenting).

258. *Id.* (Marshall, J., dissenting).

259. *Id.* (Marshall, J., dissenting) (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

by requiring declarants to affirm, deny or qualify their out-of-court statements.²⁶⁰ Therefore, according to the dissent, applying the unavailability rule to co-conspirators' extrajudicial statements would not destroy their value as substantive evidence.²⁶¹ Justice Marshall wrote that "[w]hatever truth is contained in [the declarants'] extrajudicial declarations cannot be lost."²⁶²

In the third part, the dissent criticized the majority's reasoning that because the defendant may always call the co-conspirator declarant as his own witness under the compulsory process clause,²⁶³ the prosecution need not produce the declarant.²⁶⁴ The dissent asserted that the confrontation clause provides a defendant with the *right* to be confronted with a witness against him, not merely the opportunity to compel witnesses of his own.²⁶⁵

Aside from the theoretical problems posed by the majority's contention that the defendant may call the co-conspirator declarant, the dissent maintained that this reasoning shifts the "significant practical burden" of identifying co-conspirators' statements to the defendant.²⁶⁶ The dissent argued that even using the "agency theory"²⁶⁷ of imputing to the defendant the actions of co-conspirators, the accused may not know all the persons in a complex conspiracy.²⁶⁸ As between the prosecution and the defense, the dissent argued that "the prosecution is in a better position to identify [members of the conspiracy] and to initiate their production"²⁶⁹ Thus, the prosecution should have the burden of identifying and calling witnesses whose extrajudicial statements the prosecution wishes to use against the accused.

Asserting that the tactical advantages to the defendant would be lost if the defendant had to call the declarant as his or her own witness, the dissent stated that the right to impeach the co-conspirator declarant under Federal Rule of Evidence 806²⁷⁰ is not equivalent to the right to immediately cross-examine the declarant when called as the prosecution

260. *Id.* at 1133 (Marshall, J., dissenting).

261. *Id.* (Marshall, J., dissenting).

262. *Id.* (Marshall, J., dissenting).

263. See *supra* note 225 and accompanying text and *infra* notes 324-33 and accompanying text for a discussion of the compulsory process clause.

264. *Inadi*, 106 S. Ct. at 1133-35 (Marshall, J., dissenting).

265. *Id.* at 1133 (Marshall, J., dissenting).

266. *Id.* at 1133-34 (Marshall, J., dissenting).

267. See *supra* note 254 and accompanying text.

268. *Inadi*, 106 S. Ct. at 1133-34 (Marshall, J., dissenting).

269. *Id.* at 1134 (Marshall, J., dissenting) (quoting Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 616 (1978)).

270. See *supra* note 221 for text of Rule 806.

witness.²⁷¹ The dissent argued that if the prosecution is allowed to introduce the extrajudicial statements absent the declarant, the only cross-examination will be of the person who recorded them.²⁷² Inquiry into the reliability of the declarations will not be made until the defense calls the co-conspirator.²⁷³ Thus, the time elapsing between the introduction of the statements and the "cross-examination"²⁷⁴ of the declarant may be so substantial that the statements will remain unrebutted in the jurors' minds.²⁷⁵ For example, the dissent observed that in complex conspiracy trials, the statements may remain unrebutted for weeks.²⁷⁶ In addition, if the defendant calls the declarant as a defense witness, this may bolster the jurors' perceptions of the conspiratorial relationship between the defendant and witness, even if the witness has been certified as hostile by the court.²⁷⁷

The dissent also recognized an additional disadvantage to the defendant in federal prosecutions. A defendant calling his or her own witness has no statutory right to obtain prior statements of the witness in the government's possession because the defendant is given that right only after the witness has testified on *direct* examination.²⁷⁸ Hence, the dissent asserted that the majority's reliance on the defendant's right to compulsory process deprived the defendant of critical advantages which the confrontation clause provides.²⁷⁹

In the last part of the analysis, the dissent criticized the majority's reasoning that the defendant's constitutional rights should be subordinated to concerns about prosecutorial efficiency.²⁸⁰ Recalling

271. *Inadi*, 106 S. Ct. at 1134 (Marshall, J., dissenting). See *infra* text accompanying notes 334-37.

272. *Id.*

273. See *infra* text accompanying notes 333-37.

274. Rule 806 provides that "[i]f the party against whom a hearsay statement had been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination." FED. R. EVID. 806.

275. *Inadi*, 106 S. Ct. at 1134 (Marshall, J., dissenting).

276. *Id.* (Marshall, J., dissenting).

277. *Id.* (Marshall, J., dissenting).

278. *Id.* (Marshall, J., dissenting) (citing 18 U.S.C. § 3500 (1982)). Section 3500(a) provides:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

See also *infra* text accompanying note 338-39.

279. *Inadi*, 106 S. Ct. at 1134 (Marshall, J., dissenting).

280. *Id.* at 1135 (Marshall, J., dissenting).

that the confrontation clause may have been spurred by Sir Walter Raleigh's conviction which had been based on recanted depositions of an alleged accomplice, Justice Marshall wrote:

[T]he Framers . . . would surely have been as apprehensive of the spectacle of a defendant's conviction upon the testimony of a handful of surveillance technicians and a very large box of tapes recording the boasts, faulty recollections, and coded or ambiguous utterances of outlaws. The Court's decision helps clear the way for this spectacle [sic] to become a common occurrence.²⁸¹

V. ANALYSIS OF THE DECISION

A. Scope of *Ohio v. Roberts*

In *United States v. Inadi*,²⁸² the Court significantly narrowed the two-prong test established in *Ohio v. Roberts*,²⁸³ requiring a showing of unavailability and reliability²⁸⁴ as a condition for admission of out-of-court statements absent the declarant.²⁸⁵ The *Inadi* Court wrote that "*Roberts* itself disclaimed any intention of proposing a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay."²⁸⁶ Further, the Court stated that "*Roberts* should not be read as an abstract answer to questions not presented in that case"²⁸⁷ However, the language of *Roberts* contradicts these statements.

In *Roberts*, the defendant challenged the admission of testimony given at a prior judicial hearing.²⁸⁸ The *Roberts* Court, canvassing the history of the relationship between the confrontation clause and hearsay²⁸⁹ found that "[t]he Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest . . . is the right of cross-examination.'"²⁹⁰ However, the Court acknowledged that the competing interests of public policy and the necessities of the case may justify dispensing with a

281. *Id.* (Marshall, J., dissenting).

282. 106 S. Ct. 1121 (1986).

283. 448 U.S. 56 (1980).

284. *Id.* at 65-66.

285. *Inadi*, 106 S. Ct. at 1125-26.

286. *Id.* at 1125.

287. *Id.*

288. *Roberts*, 448 U.S. 59. See *supra* notes 11-15 and 162-87 and accompanying text for a discussion of the case.

289. *Id.* at 62-64.

290. *Id.* at 63 (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)(footnote omitted)).

defendant's confrontation right at trial.²⁹¹ After recognizing these competing interests, the *Roberts* Court announced that it would not seek to "map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay exceptions'"²⁹² but stated that "a general approach to the problem is discernible."²⁹³ This language does not confine itself to addressing merely the prior testimony exception. The *Inadi* Court's finding that *Roberts* should be read as merely reaffirming a long-standing rule that the unavailability requirement applies only to prior testimony²⁹⁴ is not supported by the very language of *Roberts*.

Roberts sets out an analytical framework which on its face seems to clearly apply to all hearsay exceptions that do not require the declarant to be available.²⁹⁵ The *Roberts* Court announced the following two-prong test:

The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. . . . [T]he prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

The second aspect operates once a witness is shown to be unavailable. . . . Even then, [the] statement is admissible only if it bears adequate "indicia of reliability."²⁹⁶

291. *Id.* at 64.

292. *Id.* at 64-65 (quoting *California v. Green*, 399 U.S. 149, 162 (1970)).

293. *Id.* at 65 (emphasis added).

294. *Inadi*, 106 S. Ct. at 1126.

295. The Federal Rules of Evidence divide the hearsay exceptions into two categories. Under the 24 exceptions found in rule 803, the availability of the declarant is immaterial. FED. R. EVID. 803. The advisory committee's note to rule 803 provides in pertinent part:

The . . . rule [803] proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor.

FED. R. EVID. 803, advisory committee's note.

Rule 804, with its five hearsay exceptions, requires the declarant to be unavailable prior to admitting the hearsay statement. FED. R. EVID. 804. See note 14 for a definition of unavailability. Whereas rule 803 is based on the belief that hearsay statements falling within one of its exceptions possesses circumstantial guarantees of trustworthiness, the exceptions under rule 804 are based on the belief that if the declarant is unavailable, and if the hearsay meets specified quality, the hearsay is preferred over complete loss of the evidence of the declarant. FED. R. EVID. 804, advisory committee's note.

296. *Roberts*, 448 U.S. at 65-66 (citations omitted).

It is difficult to conceive how the *Inadi* Court construed this language to limit the *Roberts* two-prong analysis to prior testimony.²⁹⁷ The *Inadi* Court's assertion that *Roberts* disclaimed any intention of proposing a general rule to the relationship between the confrontation clause and the hearsay exception is plainly wrong. The language which the *Inadi* Court selected to suggest that *Roberts* limited its scope to prior testimony is misleading. *Inadi* correctly stated that *Roberts* did not seek to establish a theory of the confrontation clause that would "determine the validity of all . . . hearsay exceptions"²⁹⁸ but failed to note that *Roberts* did announce that "a general approach . . . is discernible."²⁹⁹

One commentator has suggested that the *Roberts* Court did not recognize the sweeping ramifications of the unavailability requirement.³⁰⁰ The *Roberts* two-prong test did have a profound impact on criminal trials, by restricting the prosecutorial use of numerous hearsay exceptions which had traditionally been available to the government.³⁰¹ But the *Inadi* Court would have been far more honest by directly addressing the impact of *Roberts* and perhaps limiting its holding to prior testimony. Instead the *Inadi* Court claimed that *Roberts* was never meant as a general approach to the confrontation clause and the hearsay exceptions.³⁰²

B. Reliability of Co-Conspirators' Declarations

The Court in *United States v. Inadi*³⁰³ reasoned that the unavailabil-

297. *United States v. Inadi*, 106 S. Ct. 1121, 1125-26 (1986).

298. *Id.* at 1125 (quoting *Ohio v. Roberts*, 448 U.S. 56, 64-65 (1980)) (citing *California v. Green*, 399 U.S. 149, 162 (1970)) (emphasis added).

299. 448 U.S. at 64-65 (emphasis added). Although *Inadi* claimed that *Roberts* did not offer a general approach to the competing interests between the confrontation clause and hearsay, the Court's recent discussion of *Roberts* in *Bourjaily v. United States*, 55 U.S.L.W. 4962 (1987) appears to conflict with *Inadi*, the *Bourjaily* Court, referring to *Roberts*, stated:

[W]e have attempted to harmonize the goal of the [Confrontation] Clause . . . with a societal interest in accurate factfinding, which may require consideration of out-of-court statements. To accommodate these competing interests, the Court has, as a general matter only, required the prosecution to demonstrate both the unavailability of the declarant and the "indicia of reliability" surrounding the out-of-court declarant. . . .

The Court's decision in *Ohio v. Roberts* laid down only "a general approach to the problem" of reconciling hearsay exceptions with the Confrontation Clause. 55 U.S.L.W. 4962, 4965 (1987) (citing *Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980)). These statements contradict *Inadi*'s contention that the two-prong test announced in *Roberts* applied only to preliminary hearing testimony and did not attempt to set out a general approach to the conflict between the confrontation clause and hearsay. 106 S. Ct. 1121, 1125 (1986).

300. Kirkpatrick, *supra* note 9, at 660-68; Lilly, *supra* note 9, at 225.

301. *See supra* note 15.

302. *Inadi*, 106 S. Ct. at 1125-26.

303. 106 S. Ct. 1121 (1986).

ity rule is inapplicable to co-conspirator's extrajudicial statements.³⁰⁴ *Inadi* stated that "[c]onspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand."³⁰⁵ The Court's observation is probably correct. Testimony in court will rarely, if ever, recapture the evidentiary significance of declarations made while a conspiracy is in progress. The extrajudicial statements are "usually irreplaceable as substantive evidence."³⁰⁶ But the fact that conspirators speak differently during the conspiracy than at trial does not depreciate the value of either the in-court or out-of-court declarations. The *Inadi* Court seems to fear that producing the co-conspirator declarant at trial will somehow destroy the extrajudicial statements as substantive evidence.³⁰⁷ However, contrary to this concern, cross-examination of a co-conspirator will only enhance the "truth-determining process,"³⁰⁸ for cross-examination gives the trier of fact the opportunity to hear the declarant's answers under cross-examination and to observe his demeanor.

The *Inadi* Court's failure to apply the *Ohio v. Roberts*³⁰⁹ two-prong analysis allows the prosecution to admit the co-conspirator's extrajudicial declarations for the truth of the matters asserted without requiring even the slightest effort of the prosecution to produce the declarant. The Court's focus on the qualitative difference between the extrajudicial statement and in-court testimony does not address a crucial issue which is the reliability of the statements.

Although *Inadi* stated that "[t]he reliability of the out-of-court statements is not at issue in this case,"³¹⁰ the Court appeared to believe that co-conspirators' extrajudicial statements provide reliable evidence which "cannot be replicated, even if the declarant testifies to the same matters in court."³¹¹ But the Court fails to support this notion. Co-conspirator's extrajudicial statements are not inherently reliable. In fact, the opposite appears to be true.³¹² Numerous commentators have noted the lack of trustworthiness in co-conspirators' declarations.³¹³ One com-

304. *Id.* at 1126.

305. *Id.*

306. *Id.* at 1127.

307. *Id.* at 1132 (Marshall, J., dissenting).

308. *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

309. 448 U.S. 56 (1980).

310. *Id.* at 1124 n.3.

311. *Id.* at 1126.

312. See *supra* notes 245-55 and accompanying text.

313. See Note, *supra* note 250, at 1310-12; Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384-91 (1972); Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1165-66 (1954).

mentator wrote:

Because they have a special incentive to shift blame to one another, coconspirators are likely to bend the truth of their statements. They are also likely to speak in code words or names that make the identification of their meaning or subject matter ambiguous. Because the nature of conspiracy requires sharing of information only on a 'need to know' basis, a coconspirator may be unaware of facets of a conspiracy beyond his own particular role, and may misperceive the roles of others.³¹⁴

Thus, the fact that a statement was made during the course of a conspiracy does not guarantee its reliability. Requiring the prosecution to make a good faith effort to produce the co-conspirator declarant will further advance the truth, the goal of the confrontation clause.

C. *Value of an Unavailability Rule*

Reasoning that an unavailability rule has little value since the statements may be admitted if the declarant is either unavailable or is available and produced by the prosecution,³¹⁵ *Inadi* indicated that the unavailability rule "does not actually serve to exclude anything unless the prosecution makes the mistake of not producing an otherwise available witness."³¹⁶ However, this is precisely the point of the unavailability rule. Without this rule, the prosecution is free to build a case based on co-conspirator hearsay which is devastating to the defendant. As one commentator noted:

[T]he purpose of [the unavailability] rule is to force the prosecutor to put forward the best case he has against the defendant. There is something innately unfair and reminiscent of trial by affidavit in a process that allows the prosecutor to build a case with hearsay, while the defendant is forced to scramble about and exhaust his own, often scarce resources to attempt to produce the declarants. . . . [T]he co-conspirator declarant is a particularly vital and involved witness. . . . The danger of unreliability in such cases is especially great.³¹⁷

The Court's assertion that the unavailability rule is unlikely to produce much useful testimony presumes that only those declarants who neither side thinks will be helpful will not have been called as wit-

314. Note, *supra* note 250, at 1311-12 (footnotes omitted).

315. *United States v. Inadi*, 106 S. Ct. 1121, 1127 (1986).

316. *Id.*

317. Davenport, *supra* note 313, at 1403 (footnote omitted).

nesses.³¹⁸ This assertion ignores the real reason why the co-conspirator declarant is not subpoenaed by either the defense or the prosecution—neither side wants him.³¹⁹ The declarant is not sought by the prosecution or the defense because he is in a position of damaging both cases.³²⁰ The co-conspirator and the defendant are no longer partners in a crime, but potential witnesses against each other with damaging information. The prosecution and the declarant are also at odds since the prosecution is likely to seek the conspirator's indictment.³²¹ Absent the unavailability rule, the prosecution may introduce the co-conspirator's declarations without encountering any of the risks of calling him as a witness, thereby denying the defendant the opportunity to cross-examine a witness against him.

In addressing the defendant's dilemma of having a co-conspirator's extrajudicial statements used against him, *Inadi* suggests that the defendant always has the option of calling the declarant under Federal Rule of Evidence 806.³²² Rule 806 allows the defendant to "examine [the declarant] on the statement as if under cross-examination."³²³ The Court relies on the compulsory process clause³²⁴ to aid the defendant in obtaining the declarant's presence.³²⁵

The Court, however, is mistaken in equating the sixth amendment confrontation clause with the compulsory process clause.³²⁶ The two are not the same. In fact, they are the opposite of each other. The difference lies in allocating "between the prosecution and the defense the burden of taking the initiative in identifying the witnesses to be produced."³²⁷ The confrontation clause places on the prosecution the burden of confronting the defendant with witnesses against him, whereas the compulsory process clause places on the defendant the burden of identifying and requesting the production of witnesses in his favor.³²⁸ In other words, "the manner in which the two clauses allocate the burden of producing wit-

318. *Inadi*, 106 S. Ct. at 1127. Curiously, the Court does acknowledge in a footnote that probably neither the prosecution nor the defense wanted to call the declarant because he may have damaged both sides. *Id.* at 1127 n.7.

319. *Id.* at 1127 n.7.

320. *Id.* at 1126.

321. *Id.*

322. *Id.* at 1127-28; see *supra* note 221.

323. FED. R. EVID. 806.

324. See *supra* note 225.

325. *Inadi*, 106 S. Ct. at 1128.

326. See *supra* note 225.

327. See Westen, *supra* note 269, at 602.

328. *Id.*

nesses is designed to assist the accused in presenting a defense.”³²⁹ The *Inadi* Court’s assertion that the defendant’s confrontation rights are not violated because the defendant can use the compulsory process clause to call adverse witnesses defeats the very purpose of both sixth amendment protections.

In addition, a significant practical burden is placed on the defendant by having him identify co-conspirator declarations. Since conspirators often share information only on a “need to know” basis,³³⁰ the defendant may be in no better position than the prosecution to make the identifications.³³¹ As between the two sides, the prosecution is better able to identify and produce the declarant than the defendant.³³²

The Court’s equation of the confrontation clause with the compulsory process clause also deprives the defendant of a significant tactical advantage that the confrontation clause was meant to provide. One commentator wrote that “the sixth amendment allocates the burden of production between the prosecution and the defense in order to facilitate the defendant’s interest in being able to secure and examine witnesses *at a time when their incriminating evidence is not yet frozen in the jury’s mind.*”³³³

Inadi’s suggestion that the defendant may call and examine the declarant “as if under cross-examination” using Federal Rule of Evidence 806³³⁴ does not address the problem of the substantial time lapse from the time the prosecution introduces the extrajudicial statements to the time the declarant is examined. Under the Court’s proposal, the prosecution can introduce the damaging declarations of the co-conspirator absent any inquiry into the reliability of the statements.³³⁵ The only cross-examination the defendant is able to conduct during this time is how and whether the statements were made. Inquiry into the reliability of the statement would have to wait for the prosecution to rest its case. Only then would the defendant be able to call the declarant. By that time it may be too late. The jurors may have already irrevocably drawn their conclusions.³³⁶ Justice Marshall noted in his dissent that “[o]nly a lawyer without trial experience would suggest that the limited right to impeach one’s own witness is the equivalent of that right to immediate

329. *Id.* at 616.

330. *See Note, supra* note 250, at 1311.

331. *Inadi*, 106 S. Ct. at 1133-34 (Marshall, J., dissenting).

332. *Id.* at 1134. *See Westen, supra* note 269, at 616.

333. *See Westen, supra* note 269, at 616 (emphasis added).

334. *Inadi*, 106 S. Ct. at 1127-28. *See supra* note 221.

335. *Inadi*, 106 S. Ct. at 1134.

336. *Id.*

cross-examination which has always been regarded as the greatest safeguard of American trial procedure.'"³³⁷

The defendant in federal prosecutions loses an additional advantage. In a federal criminal proceeding, no statement made by a prosecution witness is discoverable until after the witness has testified on direct examination.³³⁸ Since the prosecution may use the out-of-court declarations of a co-conspirator without having to produce the declarant, the prosecution will likely never place the declarant on direct examination. Thus, the co-conspirator's statements are not even discoverable to the defense prior to the trial which heightens the risk of trial by affidavit. *Inadi* not only places the burden on the defendant to identify and initiate the production of witnesses against him, but the defendant loses the statutory right to obtain prior statements of the witnesses in the government's possession.³³⁹

Therefore, the belief that the unavailability rule is unnecessary because it would not provide much testimony that would aid the "truth-determining process"³⁴⁰ is wholly unrealistic. The unavailability requirement helps protect defendants from trial by affidavit, the very abuse upon which the confrontation clause was founded.³⁴¹

D. *Burdens versus Benefits of the Unavailability Rule*

The impetus behind the *United States v. Inadi*³⁴² decision appears to be the Court's concern for prosecutorial efficiency. The Court weighed the benefits against the burdens of the unavailability rule, and found that the unavailability requirement "automatically adds another avenue of appellate review in these complex cases" and "impose[s] a substantial burden on the entire criminal justice system."³⁴³ However, the Court failed to cite any case support for its conclusion. In fact, the very position the Court took concerning the heavy burden that the unavailability rule places on the penal system was previously rejected in *Barber v. Page*.³⁴⁴ In addressing the lack of prosecutorial effort to produce the declarant, the *Barber* Court held that "a witness is not 'unavailable' for purposes of

337. *Id.* at 1134 (Marshall, J., dissenting) (quoting *New York Life Ins. Co. v. Taylor*, 147 F.2d 297, 305 (U.S. App. D.C. 1945)).

338. *Id.* at 1134 (Marshall, J., dissenting); see *supra* note 278 and accompanying text.

339. *Id.*

340. *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

341. See *supra* note 53.

342. 106 S. Ct. 1121 (1986).

343. *Id.* at 1128.

344. 390 U.S. 719, 723-25 (1968). See *supra* notes 92-109 and accompanying text for a discussion of this case.

the . . . confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. . . . The right of confrontation may not be dispensed with so lightly."³⁴⁵ The Court always had to weigh the defendant's right of confrontation against the necessities of the case.³⁴⁶ However, without the unavailability requirement, the issue of necessity is never reached, for the prosecution need not even attempt to produce the declarant whose out-of-court statement it wishes to use against the defendant. Surely, with extrajudicial declarations as devastating as those of co-conspirators, requiring that the prosecution make a good faith effort to secure the presence of the declarant is not too much to ask.

VI. CONCLUSION

Throughout the history of the confrontation clause, the hallmark of this constitutional protection has been the strong belief in a defendant's right to cross-examine witnesses against him. In 1895, the Court wrote in the leading confrontation case that "[t]he primary objective of the [confrontation clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness."³⁴⁷ The *United States v. Inadi*³⁴⁸ decision signals a return to the very abusive practices which the confrontation clause was created to prevent.³⁴⁹ The decision allows the prosecution to introduce a co-conspirator's extrajudicial declarations without making even the slightest effort to produce the declarant for cross-examination.³⁵⁰ While prosecutors may applaud, this decision is sadly reminiscent of the days of trial by affidavit.

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345. 390 U.S. at 724-25.

346. *Mattox v. United States*, 156 U.S. 237, 243 (1895).

347. *Id.* at 242.

348. 106 S. Ct. 1121 (1986).

349. *See supra* note 53.

350. *Inadi*, 106 S. Ct. at 1130.

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